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Supreme Court

of the

United States

Case Number:

Appellate Number: 78-5600

VENERANDO GERMAN SERRANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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in the

Supreme Court

of the

United States

Case Number:

Appellate Number: 78-5600

VENERANDO GERMAN SERRANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on December 7, 1979, rehearing denied February 4, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at ____ F.2d ____ and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 7, 1979. Rehearing was denied by said Court on February 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Whether United States Customs Agents lack the authority under 19 U.S.C. 1581 to board an American vessel in inland waters when no recent nexus to the border can be established.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and affects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. 1581(a) provides that:

> Any officer of the Customs may at any time go on board of any vessel or vehicle at any place in the United States or within the Customs waters or, as he may be authorized, within a Customs enforcement area established under Section 1701 and 1703-11 of this Title, or at any authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

STATEMENT OF THE CASE

Petitioner was convicted of Possession With Intent to Distribute Marijuana and Conspiracy to Possess With Intent to Distribute Marijuana in violation of Federal law on August 15, 1978. An Appeal was taken to the Fifth Circuit Court of Appeals. Appellant's conviction was affirmed by said Appellate court by decision rendered December 7, 1979, rehearing denied February 4, 1980. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

As described by the Circuit Court of Appeal for the Fifth Circuit in its opinion, the facts of this case are as follows: "During a routine patrol of Tampa Bay around midnight on June 8, 1978, Customs officers spotted a shrimping vessel approximately sixty feet in length traveling up the shipping channel of Tampa without required red and green navigational lights on the bow or a white light on the stern. A Customs boat pulled off to the side of the channel and then followed the vessel at a distance of a mile and a half to a mile. Officers utilized night vision devices to assist surveillance. The shrimping vessel left the channel and proceeded into shallow waters as it neared Apollo Beach, a residential area with a public launching facility and marina. Its range and deck lights were extinguished, and it went dead in the water. Lights were flashed between the shrimper and a smaller vessel and the two (2) vessels approached or closed with each other. Approximately forty-five minutes later, the shrimper returned to the shipping channel without lights. In the channel all required lights, including navigational lights, were turned on. As the vessel headed down the bay toward the open waters of the Gulf of Mexico, several small boats were sighted in her immediate vicinity. Customs officers identified the vessel as the Bonnie Lass, identified themselves and boarded the vessel. A Customs' officer was handed the ship's documents and questioned one of five men aboard as to whether he was the captain or owner or master named in the documents and whether the vessel was carrying any cargo, shrimp or fish. During the conversation the officer smelled marijuana. The search which followed revealed 1,312 bales of marijuana aboard."

ARGUMENT

AGENTS OF THE UNITED STATES CUSTOMS LACK THE AUTHORITY UNDER 19 U.S.C. §1581 TO BOARD AN AMERICAN VESSEL IN INLAND WATERS WHEN NO RECENT NEXUS TO THE BORDER CAN BE ESTABLISHED.

The Circuit Court of Appeal for the Fifth Circuit in its Opinion ruled as a matter of law that:

> We therefore conclude that Customs Officers may make an investigatory stop of the vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C. §1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the presence of contraband.

This decision that suspicion of a border crossing is not necessary to justify a Customs search under 19 U.S.C. §1581(a), however, conflicts with prior decisions of other panels of the United States Circuit Court of Appeals for the Fifth Circuit.

19 U.S.C. §1581(a) provides that:

> Any officer of the Customs may at any time go on board of any vessel or vehicle at any place in the United States or within the Customs waters or, as he may be authorized, within a Customs enforcement area established under §1701 and 1703-11 of this Title, or at any authorized

> place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Such a general and apparently absolute right to board is, however, limited by both constitutional and statutorial limitations. Since 19 U.S.C. §1581 is specifically a statute authorizing the boarding of vessels for the enforcement of Customs regulations, it must be remembered that, "the primordial purpose of a search by Customs officers is not to apprehend the persons, but to seize contraband and property unlawfully imported or brought into the United States." *Alexander v. United States,* 362 F.2d 379 (Cir. 1966). Generally speaking, "it would thus appear that §581 (19 U.S.C. §481, now 19 U.S.C. §1581) applies only to vessels arriving in or bound for the United States in carrying goods or persons from foreign ports." *Fish v. Brophy,* 52 F.2d 198 (1931).

This concept that a vessel must first cross a border before Customs may invoke their authority under 19 U.S.C. §1581, has been followed in several cases, including *United States v. Caraway,* 474 F.2d 25 (5th Cir. 1973), vacated *en banc* as moot, 483 F.2d 215 (5th Cir. 1973). Although it is not necessary for Customs agents to visually observe the vessel as it crosses the imaginary line which delineates international from inland waters, agents still must be able to point to some evidence which allows them to reasonably believe that the vessel to be boarded has recently been in

international waters. *United States v. Ingham,* 502 F.2d 1287 (5th Cir. 1974). "At the time of the search, the suspect must have had some reasonably direct connection with the border, considering such factors as the cause for the initiation for the search, the distance from the border, and the original point of entry, and the time elapsed since entry." *United States v. Soria,* 519 F.2d 1060 (5th Cir. 1975). Simply stated, in order to invoke the authority created by 19 U.S.C. §1581, it is first necessary that there exist, "a high degree of probability that a border crossing took place." *United States v. Brennan,* 538 F.2d 711 (5th Cir. 1976).

And the mere fact that the Bonnie Lass was seen in the bay and in the channel connected to the bay does not indicate that a border crossing has necessarily occurred since "a bay adjacent to an ocean is a functional equivalent of a border *only* before entry." *United States v. Solmes,* 527 F.2d 1370 (9th Cir. 1975). In the case at Bar there was no evidence presented that the Bonnie Lass had ever been observed in foreign waters.

Since, "the statutory authority under which border searches are conducted designate a border *crossing* . . . as the event giving rise to the authority to conduct a border search," *United States v. Storm,* 480 F.2d 701 (5th Cir. 1973), and since there is no indication or record basis for believing that the vessel Bonnie Lass had recently crossed the border, the search conducted herein is unjustified.

Furthermore, in light of the fact that a border crossing is necessary to invoke Customs authority pursuant to 19 U.S.C. §1581(a), the case at Bar which

holds that suspicion of a border crossing is not a prerequisite in direct conflict with the following prior Opinions of the United States Court of Appeal for the Fifth Circuit. *United States v. Caraway, supra; United States v. Ingham, supra; United States v. Soria, supra; United States v. Storm, supra;* and *United States v. Brennan, supra.*

The Petitioner would further respectfully submit that Customs lack the authority to conduct a general administrative documentary check and safety inspection in the absence of a warrant.

In recent years the law has developed that administrative searches are not an exception to the Fourth Amendment requirements of a search warrant. This concept first emerged in *Camara v. Municipal Court,* 387 U.S. 523, 18 L.Ed.2d 930, 87 Sup.Ct. 1727 (1967), in which the United States Supreme Court held that a warrant is necessary in order to conduct an administrative inspection pursuant to the authority contained in the municipal housing code. "We hold that administrative searches of the kind at issue here are significant intrusions upon the interest presented by the Fourth Amendment, that such searches where authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . ." Furthermore, administrative searches of commercial property have been deemed required, *See v. City of Seattle,* 387 U.S. 541, 18 L.Ed.2d 943, 87 Sup.Ct. 1737 (1967), as have administrative fire inspections, *Michigan v. Tyler,* U.S. 56 L.Ed.2d 486, 98 Sup.Ct. (1978).

Clearly, unless an administrative search is being conducted of a closely regulated governmental industry, a search warrant is a necessary prerequisite to the search. However, "probable cause in the criminal law sense is not required. For purposes of administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular (establishment).' " *Marshall v. Barlow's Inc., supra.*

To date, the Fifth Circuit Court of Appeal has failed to take into consideration the warrant requirement as set forth in *Marshall v. Barlow's Inc., supra. United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978). As recognized by Justice Fay in his dissenting Opinion at Footnote 3:

> It would be interesting to consider what effect the Supreme Court's recent Opinion in *Marshall v. Barlow's Inc.,* U.S. 98 Sup.Ct. 1816, 56 L.Ed.2d 305 (1978) has on the propriety of even an administrative stopping for the limited purpose of a safety and documentary check. The court in *Marshall* invalidated warrantless inspections of employment facilities which fall under the jurisdiction of the Occupational Safety and Health Act of 1970. It is possible that a warrantless stop limited in scope to safety violations is not justifiable under the Fourth Amendment? This particular point is beyond the scope of this dissent, but is nevertheless

> something the majority opinion sought to have discussed.

This important question which was left unanswered in *United States v. Warren, supra,* has been specifically discussed by at least one Court, *United States v. Piner,* 452 F.Supp. 1335 (N.D. California 1978), affirmed ____ F.2d____ (9th Cir. September 5, 1979). The *Piner* decision "involves an administrative inspection, here conducted in an allegedly random fashion, to ascertain compliance with and to enforce board safety regulations." As recognized in *United States v. Piner, supra:*

> The general principles governing the application of the Fourth Amendment to administrative inspections or searches were recently summarized by the Supreme Court in *Marshall v. Barlow's Inc.,* U.S. 98 Sup.Ct. 1816, 56 L.Ed.2d 305 (May 23, 1978). In that decision, the Court held a warrantless intrusion on private property to investigate compliance with statutory safety requirements to be prohibited. See, also, *Camara v. Municipal Court,* 387 U.S. 523, 87 Sup.Ct. 1727, 18 L.Ed. 930 (1967); *See v. City of Seattle,* 387 U.S. 541, 87 Sup.Ct. 1737, 18 L.Ed.2d 943 (1967).

That detention and boarding of Delphene by the coast Guard constituted an intrusion sufficient to invoke Fourth Amendment principles is beyond question. See *Terry v. Ohio,* 392 U.S. 1, 1688, Sup.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Brignoni-*

Ponce, 422 U.S. 873, 878, 95 Sup.Ct. 2574, 45 L.Ed.2d 607 (1975). Footnote 5 . . .

Footnote 5 — A series of decisions by the Fifth Circuit Court of Appeals relied on by the government appeared to have treated vessel safety inspections as being beyond the purview of the Fourth Amendment. In *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976), the Court held that 14 U.S.C. §89(a) authorized the Coast Guard to board a vessel on the high seas to conduct an administrative safety inspection. Although confronted with a Motion to Suppress, the Court did not discuss the Fourth Amendment issue. *Odom* was followed without decision in *United States v. Hillstrom,* 533 F.2d 209 (5th Cir. 1976), Cert. den., 429 U.S. 1038, 97 Sup.Ct. 734, 50 L.Ed.2d 749 (1977), and again in *United States v. Warren,* 550 F.2d 219 (5th Cir. 1976), Cert. den., 429 U.S. 1038, 97 Sup.Ct. 734, 50 L.Ed.2d 749 (1977), and again in *United States v. Warren,* 550 F.2d 219 (5th Cir. 1977), Cert. den., 434 U.S. 1016, 98 Sup.Ct. 735, 54 L.Ed.2d 762. In the latter case, the Court reversed a conviction based on evidence obtained during a warrantless search of a vessel by D.E.A. and Customs agents, following a Coast Guard safety inspection. With respect to the lawfulness of the inspection, however, it stated that §89(a) had been held constitutional by the Fifth Circuit although it acknowledged, without elaboration, that "§89(a), is subject to serious constitutional attack if implemented without caution and restraint." (550 F.2d at 224).

The applicability of the *Marshall v. Barlow's Inc.* doctrine to vessel searches has recently been touched upon by the Honorable Alvin B. Rubin in his concurring opinion in *United States v. Whitmire,* 595 F.2d 1303 (5th Cir. 1979). Although the majority of this Court has yet failed to consider the effect of *Marshall v. Barlow's Inc., supra,* Judge Rubin in Footnote 2 is aware of the doctrine's possible effects.

> In *Marshall v. Barlow's Inc.*, 1978, 436 U.S. 307, 98 Sup.Ct. 1816, 56 L.Ed.2d 305, the Court refused to sanction inspections of private industrial premises for OSHA purposes. It recognized that some searches of "pervasively regulated businesses" and of "closely regulated industries long subject to close supervision and inspection" are valid sans warrant. Id. at 313, 98 Sup.Ct. at 1820-21, 56 L.Ed.2d at 311. I do not believe that merely sailing a vessel is sufficient to make every navigator subject to search or that helmsmen constitute an industry having "such a history of government oversight that no reasonable expectation of privacy could exist."

Thus, as recognized in *United States v. Piner, supra,* and in Judge Rubin's concurring opinion in *United States v. Whitmire, supra,* the absolute boarding authority given to the Coast Guard under 14 U.S.C. 89 and to Customs under 19 U.S.C. 1581(a) is limited by constitutional restraint. One such constitutional restraint is a necessity of a warrant to justify the administrative search pursuant to *Marshall v. Barlow's Inc., supra.* As such, the arbitrary stopping and boarding of the Defendant's vessel solely for the purpose

of conducting a warrantless administrative search or compliance with documentation and safety regulations is unconstitutional.

As a matter of statutory interpretation, the Fifth Circuit Court of Appeals has routinely held that Customs pursuant to 19 U.S.C. 1581(a) and Coast Guard pursuant to 14 U.S.C. 89 have absolute authority to board vessels within United States territorial waters for the purpose of conducting documentation and safety examinations in the absence of either reasonable suspicion or probable cause. *United States v. Freeman,* 579 F.2d 942 (5th Cir. 1978); *United States v. Whitaker,* 592 F.2d 826 (5th Cir. 1979); *United States v. Warren,* 578 F.2d 1058 (5th Cir. 1978); *United States v. Odom,* 526 F.2d 339 (5th Cir. 1976); and *United States v. One 43 Foot Sailing Vessel,* 538 F.2d 694 (5th Cir. 1976). These decisions, however, have been subject to much attack. See *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976); *United States v. Whitmire,* 595 F.2d 1303 (5th Cir. 1979); *United States v. Kleinschmidt,* 596 F.2d 133 (5th Cir. 1979); and *United States v. Piner,* ____ F.2d____ (9th Cir. September 5, 1979).

Although 19 U.S.C. 1581(a) and 14 U.S.C. §89 appear to give absolute authority to Customs and Coast Guard agents to board in the absence of either reasonable suspicion or probable cause, "the existence of statutory authority does not, however, immunize a search against Fourth Amendment's scrutiny. *Almeida-Sanchez v. United States,* 413 U.S. 266, 272, 93 Sup.Ct. 2535, 37 L.Ed.2d 596 (1973); *United States v. Bowen,* 500 F.2d 960, (9th Cir. 1974), affirmed 422 U.S. 916, 95 Sup.Ct. 2569, 45 L.Ed.2d 641 (1975)." *United States v. Piner, supra.* Even if an absolute statutory right exists

to search, reasonable suspicion is still required by the Constitution. "No act of Congress can authorize a violation of the Constitution." *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 Sup.Ct. 2574, 45 L.Ed.2d 607 (1975).

In recently prohibiting the random stop and detention of automobile drivers in order to check driver's licenses and vehicle's registration, this Court repeatedly made reference to the analogy of border searches which require reasonable suspicion. *Delaware v. Prouse,* ____U.S.____, 99 Sup.Ct., 59 L.Ed.2d 660 (1979). As recognized by the Court, "Regulatory inspections unaccompanied by any quantum of individualized, articutable suspicion must be undertaken pursuant to previously specified 'neutral criteria'." *Delaware v. Prouse, supra,* at 58 L.Ed. 660.

Referring to both automobile and border searches, this Court recently in *Brown v. Texas,* ____U.S.____, 99 Sup.Ct. ____, 61 L.Ed.2d 357 (1979) held as follows:

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware v. Prouse,* 440 U.S. ____, 59 L.Ed.2d 660, 99 Sup.Ct. 139 (1979); *United States v. Brignoni-Ponce, supra,* at 882, 54 L.Ed.2d 607, 95 Sup.Ct. 2574. To this end, the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society's legitimate interests require the seizure

of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations of a conduct of individual officers. *Delaware v. Prouse, supra,* at 59 L.Ed.2d 660, 99 Sup.Ct. 1391. See *United States v. Martinez-Fuerte,* 428 U.S. 543, 558-562, 49 L.Ed.2d 1116, 96 Sup.Ct. 3074 (1976) . . .

We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have "probable cause" to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. *United States v. Brignoni-Ponce, supra,* at 880-881, 54 L.Ed.2d 607, 95 Sup.Ct. 2574. See *Terry v. Ohio,* 392 U.S. 1, 25-26, 20 L.Ed.2d 889, 88 Sup.Ct. 1868, 44 Ohio Ops. 2d 383 (1968). However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Delaware v. Prouse, supra,* at _____, 59 L.Ed.2d 660, 99 Sup.Ct. 1391; *United States v. Brignoni-Ponce, supra,* at 882-883, 54 L.Ed.2d 607, 95 Sup.Ct. 2574; see, also, *Lanzetta v. New Jersey,* 306 U.S. 451, 83 L.Ed. 888, 50 Sup.Ct. 618 (1939).

Defendant would respectfully submit that the doctrine enunciated by this Court in *Delaware v. Prouse, supra,* and *Brown v. State of Texas, supra,* equally applies to Customs administrative searches. The applicability of these doctrines to administrative safety and documentary searches aboard sea-going vessels has

been recognized by at least one jurisdiction. In *Casel and Garcia v. State,* ___So.2d___ (Fla. 3DCA August 14, 1979), Florida courts ruled that law enforcement agencies could not board a vessel for the purpose of a documentary check unless reasonable suspicion existed to believe that a violation existed.

The express applicability of *Delaware v. Prouse, supra,* to Coast Guard and Customs boarding has been recognized by the Ninth Circuit in *United States v. Piner,* ___ F.2d___ (9th Cir. September 5, 1979), as was the underlying concept of *Almeida-Sanchez v. United States, supra,* previously recognized by that Circuit. *United States v. Stanley,* 545 F.2d 661 (9th Cir. 1976).

As such, the Petitioner would respectfully submit that the random stopping of his vessel is unconstitutional in the absence of reasonable suspicion prior to boarding.

Thus, since Customs was unable to determine that the Petitioner's vessel had a recent nexus to the border, proceeded without an administrative warrant, and randomly searched the vessel, Petitioner would respectfully submit that the search conducted in the case at Bar was illegal under the dictates of this Court.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this ____day of _____, 1980, forwarded to Douglas J. Titus, Assistant United States Attorney, Office of the United States Attorney; Post Office Box 2841, Tampa, Florida 33601; Solicitor General, c/o United States Department of Justice, Washington, D.C.; Joseph H. Ficarotta, Esquire, Flagship Bank Building, Suite 802, 315 East Madison Street, Tampa, Florida, 33602; Bennie Lazzara, Jr., Esquire, 610 W. DeLeon, Old Hyde Park, Tampa, Florida, 33606; Anthony F. Gonzalez, Esquire, 610 W. DeLeon, Old Hyde Park, Tampa, Florida, 33606; Richard A. Lazzara, Esquire; 610 W. DeLeon, Old Hyde Park, Tampa, Florida, 33606.

WEINER, ROBBINS, TUNKEY
& ROSS, P.A.

BY:_____
WILLIAM R. TUNKEY

BY:_____
JEFFREY S. WEINER

Appendix

Opinion of the Fifth Circuit Court of Appeals

Denial of Petition for Rehearing

UNITED STATES of America,
Plaintiff-Appellee,

v.

Venerando German SERRANO, Pedro Ricardo Gutierrez, Jesus Hernandez, Juan Raymond Herrera and Raul Hernandez,
Defendants-Appellants.

No. 78-5600.

United States Court of Appeals,
Fifth Circuit.

Dec. 7, 1979.

Defendants who had been apprehended in Tampa Bay on a shrimping boat carrying 50,000 pounds of marijuana were convicted in the United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., of conspiracy to possess with intent to distribute and possession with intent to distribute marijuana, and they appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) customs officers may make an investigatory stop of a vessel on inland waters adjacent to the Gulf of Mexico on facts which justify a reasonable suspicion of illegal activity; (2) such facts existed in the instant case; (3) motions to disqualify trial judge were properly denied where alleged bias was judicial rather than personal and where facts in affidavit would not have convinced a reasonable person of the existence of personal bias against defendants; and

(4) prosecutor's comments in final rebuttal argument on defendants' failure to give customs officers the same explanation as was advanced in their closing argument was a permissible response to such closing argument and not an improper comment on defendants' silence.

Affirmed.

1. Searches and Seizures — 7(1)

Searches and seizures made pursuant to statute authorizing customs officers to board vessels, examine documents, and search the vessel must meet the general standard of reasonableness imposed by the Fourth Amendment. Tariff Act of 1930, §581(a), 19 U.S.C.A. §1581(a); U.S.C.A.Const. Amend. 4.

2. Customs Duties — 126

Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico on facts which justify a reasonable suspicion of illegal activity, and the evidence need not support a suspicion of a boarder crossing, but only of the presence of contraband. Tariff Act of 1930, §581(a), 19 U.S.C.A. §1581(a).

3. Customs Duties — 126

There existed reasonable suspicion that shrimp boat was engaged in illegal smuggling activities, justifying stopping and boarding of the vessel by customs officers on inland waters adjacent to the Gulf of Mexico, where officers had observed boat travel at

midnight up main shipping channel without navigation lights, proceed to shallow area near residential area not normally frequented by shipping vessels, rendezvous with another darkened vessel after exchange of lights, and then proceed toward the Gulf of Mexico. Tariff Act of 1930, §581(a), 19 U.S.C.A. §1581(a); U.S.C.A.Const. Amend. 4.

4. Judges — 51(4)

Once a party files a timely and sufficient affidavit that trial judge is personally prejudiced against him, statute demands the trial judge's recusal; however, while the trial judge may not pass on the truthfulness of the affidavit's allegations, he must determine whether the facts set out in the affidavit are legally sufficient to require recusal. 28 U.S.C.A. §144.

5. Judges — 51(3)

For facts set our in affidavit to be legally sufficient to require recusal of judge, facts must be material and stated with particularity, must be such that if true they would convince a reasonable person that bias exists, and must show that bias is personal as opposed to judicial in nature. 28 U.S.C.A. §144.

6. Judges — 49(2)

Motions to disqualify judge in marijuana-smuggling prosecution on ground that judge had stated in a similar case an intent to deal as sternly as the law would permit with persons convicted of importing contraband, though he would review each case on a case-by-case basis were properly denied since alleged

bias was judicial rather than personal, stemming from judge's observations in a strictly judicial capacity as to the volume of such cases and the lack of deterrent effect of light sentences, and since the facts in the affidavit would not have convinced a reasonable person of the existence of personal bias against defendants. 28 U.S.C.A. §144.

7. Judges — 49(1)

To be disqualifying, alleged bias or prejudice of judge must stem from an extrajudicial source. 28 U.S.C.A. §144.

8. Criminal Law — 706(3)

Question asked of customs officer by prosecutor as to whether defendant, after being taken into custody aboard vessel loaded with marijuana, had ever told him of his whereabouts before boarding the vessel was not so suggestive as to constitute comment on defendant's silence where objection was sustained and the question, which could have been answered "yes" or "no," was never answered.

9. Criminal Law — 720(1)

Where defendants' failure to explain their dilemma to customs agents upon boarding and initial questioning was totally inconsistent with tale of desperate flight and desire to rid themselves of cargo of marijuana which they allegedly discovered after being hired as crew aboard the vessel, and where, at time of boarding and general questioning, defendants were not subjected to coercive or custodial interrogation but only to those

restrictions imposed by a routine customs check, Government's final rebuttal argument referring to the defense theory and questioning defendants' failure to relate the same explanation to customs officers was permissible and not an improper comment on defendants' silence. U.S.C.A.Const. Amend. 5.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Five defendants apprehended in Tampa Bay, Florida, on a boat carrying 50,000 pounds of marijuana appeal convictions for conspiracy to possess with intent to distribute and possession with intent to distribute marijuana. 21 U.S.C.A. §§841(a)(1), 846. They challenge three aspects of their trial: denial of their motion to suppress evidence obtained on an alleged illegal search of the boat; denial of their motion for disqualification of the trial judge because of certain statements he had made previously about narcotics cases; and references by the Government in the course of its case-in-chief and rebuttal closing argument to defendants' silence at the time of arrest. We affirm.

During a routine patrol of Tampa Bay around midnight on June 8, 1978, Customs officers spotted a shrimping vessel approximately sixty-five feet in length traveling up the shipping channel towards Tampa without required red and green navigational lights on the bow or white light on the stern. The Customs boat

pulled off to the side of the channel and then followed the vessel at a distance of a half-mile to a mile. Officers utilized night vision devices to assist surveillance. The shrimping vessel left the channel and proceeded into shallow waters as it neared Apollo Beach, a residential area with a public launching facility and marina. Its range and deck lights were extinguished, and it went dead in the water. Lights were flashed between the shrimper and a smaller vessel and the two vessels approached or closed with each other. Approximately forty-five minutes later, the shrimper returned to the shipping channel without lights. In the channel all required lights, including navigational lights, were turned on. As the vessel headed down the bay towards the open waters of the Gulf of Mexico, several small boats were sighted in her immediate vicinity. Customs officers identified the vessel as the BONNIE LASS, identified themselves and boarded the vessel. A Customs officer was handed the ship's documents and questioned one of five men aboard as to whether he was the captain or the owner or master named in the documents and whether the vessel was carrying any cargo, shrimp or fish. During the conversation the officer smelled marijuana. The search which followed revealed 1,312 bales of marijuana on board.

I. *Denial of Motion to Suppress Evidence*

Defendants argue an unconstitutional search of the BONNIE LASS. The case was presented to the district court, and argued before this Court on Appeal, as if probable cause was required in order for the boarding of the vessel to be legal. The district court found probable cause to be a close question, but held that probable cause existed for the boarding.

Based on recent decisions by this Court, we conclude that only reasonable suspicion of illegal activity was necessary to justify the boarding. The evidence clearly meets this standard, even though the evidence might also support the denial of the motion to suppress based on the probable cause standard.

[1] Customs officers are authorized by 19 U.S.C.A. §1581(a) to

> go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

Searches and seizures made pursuant to the statute must, of course, meet the general standard of reasonableness imposed by the Fourth Amendment. *United States v. Freeman,* 579 F.2d 942, 945 (5th Cir. 1978).

This Court has considered several Fourth Amendment attacks on Customs boardings or searches conducted in inland or internal waters, the ports, harbors, bays, river mouths and adjacent parts of the

sea inside the coastline. The cases have indicated that these bodies of water adjacent to the sea are not part of "customs waters" but have not decided whether random Customs boarding and document checks would be constitutionally permissible in these waters. *See United States v. Whitmire,* 595 F.2d 1303, 1315-1316 (5th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3262 (Sept. 5, 1979, No. 79-375); *United States v. Castro,* 596 F.2d 674, 676 (5th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3177 (Aug. 13, 1979, No. 79-229).

Customs boardings have been approved in inland waters where Customs officials had reasonable suspicion of a Customs violation. In *United States v. Whitmire, supra,* the Court assessed the constitutionality of a boarding of a boat initially sighted traveling in the intracoastal waterway but boarded only after it had reached the dock and its occupants had gone ashore. The Court held the boarding constitutional where the officers had reasonable suspicion of a Customs violation, and the boarding followed an unsatisfactory document check on shore. 595 F.2d at 1316. The Court noted that but for the fact that the boat had reached shore and defendants had disembarked, the boarding would have been justified as an "investigatory stop" under *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Whitmire,* 595 F.2d at 1308.

A search of a vessel moored in a marina four miles from the Gulf of Mexico was declared unconstitutional in *United States v. Williams,* 544 F.2d 807 (5th Cir. 1977). The Court concluded that at the time of boarding the "probably unseaworthy private craft," Customs officers had

> no knowledge of articulable facts which, taken together with logical inferences from those facts, would cause them reasonably to believe that this vessel fell into customs' area of concern, or that a violation of the law was being committed on board.

544 F.2d at 811.

The Supreme Court, considering entry of illegal aliens by automobile, concluded in *Brignoni-Ponce* that Border Patrol Officers conducting roving patrols in the border area could stop vehicles where they are aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the stopped vehicle contains illegal aliens. 422 U.S. at 884, 95 S.Ct. at 2582.

Most recently, this Court considered an inland waters Customs boarding under conditions very similar to those before us. The boarding in *United States v. Castro, supra,* occurred after Customs observed the boat in the intracoastal waterway heading towards open waters 20 miles away. The boarding, which occurred before the boat reached the coastline, was held constitutional based on "sufficient articulable facts to support an inference" that the vessel was involved in smuggling contraband.

[2] We therefore conclude that Customs officers may make an investigatory stop of a vessel on inland waters adjacent to the open Gulf of Mexico under 19 U.S.C.A. §1581(a) on facts which justify a reasonable suspicion of illegal activity. The evidence need not support suspicion of a border crossing, but only of the

presence of contraband. *See United States v. Rivera,* 595 F.2d 1095, 1098 n.4 (5th Cir. 1979).

We are concerned here only with the officers' justification for stopping and boarding the vessel. Defendants do not contest the existence of probable cause to search the vessel once officers had boarded and smelled marijuana. *See United States v. Freeman,* 579 F.2d 942, 948 (5th Cir. 1978).

Brignoni-Ponce includes as factors to be considered in assessing reasonable suspicion, proximity to the border, usual traffic patterns in the area, recent illegal traffic, the driver's behavior and aspects of the vehicle's appearance. 422 U.S. at 884-885, 95 S.Ct. 2574.

[3] The BONNIE LASS was in inland waters adjacent to the open seas throughout her Customs surveillance and at the time of boarding. The Customs officers who boarded the BONNIE LASS had observed the boat traveling at midnight up the main shipping channel without navigation lights. They saw the boat turn out of the channel, extinguish all lights and proceed into a shallow area near a residential area not normally frequented by shrimping vessels. The BONNIE LASS was observed to rendezvous with another darkened vessel after an exchange of lights. One of the officers testified that in five years of patrolling Tampa Bay he had seen only one other vessel of this kind leave the channel and behave in a similar manner. During the course of this night's patrol the officers saw no vessels at all other than the ones involved in these incidents. When the vessel was stopped, though apparently still five or six miles from the "border" three miles offshore, it was nearing the mouth of the bay and was apparently

going out into the Gulf of Mexico. These observations and the rational inferences they engender reasonably warranted the Customs officers' suspicion that the BONNIE LASS was engaged in illegal smuggling activities. The stop and boarding therefore withstand defendants' constitutional challenge.

II. *Trial Judge's Refusal to Recuse Himself*

Defendants contend the trial judge committed prejudicial and reversible error in denying their motions to disqualify the trial judge, predicated on 28 U.S.C.A. §§144, 455. The affidavits accompanying defendants' motions claimed Judge Hodges had a personal bias and prejudice against defendants as members of a class of persons charged with large-scale marijuana offenses. In support of this claim, defendants recited remarks made by Judge Hodges in sentencing proceedings in a similar case several months before. Judge Hodges had stated:

> Frankly, I wonder whether the term of imprisonment now provided in these plea agreements is sufficient to serve any useful purpose as a general deterrent, given the experience that this Court has had not only recently, but contemporaneously, with the ongoing importation of contraband from Colombia into this Country, and especially this District.
>
> And I declared from this Bench as recently as yesterday in a case being tried, and in just these words, that I am sick and tired of it.

> I'm going to accept the plea agreement in this case, but I give warning now to the United States Attorney's office and to the public and without in any way abdicating my judicial discretion and reviewing each case on a case-by-case basis, that I intend to deal as sternly as the law will permit in the future with anybody who is convicted in this court before me of the offense of importing contraband from anyplace outside the United States into the United States, and I intend to apply that approach in an evenheaded fashion regardless of the nationality of the defendants.

Referring to the large number of Colombian citizens indicted for similar offenses, Judge Hodges continued:

> Perhaps the attitude I have expressed is an inflexible one. But the only tool that the law has given me to combat this obvious flow of . . . contraband from the Republic of Colombia to the United States is to put those who bring it here in prison. And I frankly declare that's what I intend to do, if I have to put the entire population of that Country in an American penitentiary.

[4, 5] Once a party files a timely and sufficient affidavit that the trial judge is personally prejudiced against him, 28 U.S.C.A. §144 demands the trial judge's recusal. While the trial judge may not pass upon the truthfulness of the affidavit's allegations, he must determine whether the facts set out in the affidavit are legally sufficient to require recusal. *Davis v. Board of School Commissioners,* 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The formula for legal sufficiency adopted by this Court requires defendant to show:

1. The facts are material and stated with particularity.

2. The facts are such that, if true they would convince a reasonable person that a bias exists.

3. The facts show the bias is personal, as opposed to judicial, in nature.

Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 100 (5th Cir. 1975) *(en banc), cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976).

[6] We conclude that Judge Hodges properly denied the motions to disqualify because the alleged bias was judicial rather than personal and because the facts in the affidavit would not have convinced a reasonable person of the existence of personal bias against the defendants.

[7] To be disqualifying, the alleged bias of prejudice must stem from an extrajudicial source. *United States v. Grinnell Corp.,* 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Davis v. Board of School Commissioners,* 517 F.2d at 1051 (origin of alleged bias was language in order then before the court and an opinion in a previous case). *See, e.g., Berger v. United States,* 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) (prejudice against German-Americans). Reading

Judge Hodges' remarks in context clearly demonstrates that any predisposition to sentence volume drug offenders severely stemmed from his observations in a strictly judicial capacity as to the volume of such cases in the courts and the lack of deterrent effect of light sentences for such offenders. *See also United States v. Johnson,* 537 F.2d 1170, 1175 (4th Cir. 1976) (district judge's announced belief heroin distribution deserved severe punishment did not disqualify him from conducting retrial); *Baskin v. Brown,* 174 F.2d 391, 394 (4th Cir. 1949) (in racial discrimination suit affidavits showed, at most, judge's zeal for upholding blacks' rights and indignation at attempts to deny them, and statute never contemplated disqualification for bias against wrongdoers acquired from evidence presented in the course of judicial proceedings before him); *Smith v. Danyo,* 441 F.Supp. 171, 180 (M.D.Pa. 1977), *aff'd,* 585 F.2d 83 (3d Cir. 1978) (attitude judge may entertain toward subject matter of a case, here sentiment that personal injury suits do not belong in federal courts, does not disqualify him); *Denis v. Perfect Parts,* 142 F.Supp. 263 (D.Mass.1956) (statute not directed to judicial exposure to similar questions so judge who had previously determined validity of plaintiff's patent could hear infringement suit against new defendant). *Cf. United States v. Thompson,* 483 F.2d 527, 530 (3d Cir. 1973), *cert. denied,* 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974) (Adams, J., *dissenting)* (bias against class "personal" when based on characteristic extraneous to judicial process, *e.g.,* race, and "judicial" when based on trait defined by legal or judicial consideration such as violation of particular law).

Neither would the facts asserted in the affidavit convince a reasonable person of the bias which disqualifies a judicial officer. While Judge Hodges' remarks indicated his dissatisfaction with the nondeterrent effect of plea-bargained light sentences and his intention to impose stiffer penalties to curb large scale drug importation, his remarks were prefaced by an explicit commitment to the continued use of judicial discretion and review of each case on a case-by-case basis. This aspect of Judge Hodges' statement distinguishes this case from the Third Circuit cases cited in support of defendants' position, *United States v. Thompson,* 483 F.2d 527 (3d Cir. 1973) and *United States v. Townsend,* 478 F.2d 1072 (3d Cir. 1973), in which the trial judge announced a practice of sentencing all selective service violators to at least two and a half years in prison no matter what "good people" they were. Nothing in Judge Hodges' statement reasonably suggests that in sentencing defendants he would fail to consider presentence reports or any defendant's statement on his own behalf or that he would not tailor sentences to the individual circumstances of each defendant. While our review is properly limited to assessment of the affidavit's sufficiency, we note that Judge Hodges used presentence reports and heard testimony in mitigation from all defendants, and a less than mandatory sentence as given each defendant.

III. *Prosecutorial Comment on Defendants' Silence*

[8] Defendants' final contention is that the Government committed reversible error by improperly commenting during trial on defendants' silence. Defendants challenge two instances of improper

comment, neither of which compels reversal of their convictions.

In examining one of the Customs officers, the Government asked whether defendant Gutierrez, after being taken into custody, had ever told him of his whereabouts before boarding the BONNIE LASS. Defendant's objection was sustained, the question was never answered and defendant Gutierrez' post-arrest silence never elicited. The question could have been answered "yes" and "no," and, standing alone, it is not so suggestive as to constitute comment on defendant's silence. *Pineda v. State of Florida,* 564 F.2d 1163 (5th Cir. 1977), *cert. denied,* 436 U.S. 909, 98 S.Ct. 2245, 56 L.Ed.2d 409 (1978).

[9] The Government in its final rebuttal argument, referring to a defense theory advanced during defendants' final arguments, questioned in the following manner defendants' failure to relate the same explanation to the Customs officers who stopped and boarded the BONNIE LASS:

> Why didn't they call the police? Why did they lie? Why did Raul Hernandez say, "No cargo — no cargo" when the Customs people got on the boat? — When it's everywhere?
>
> Why didn't he say "Thank God you're here. We've got all this pot. We hijacked this boat. I don't know who it belongs to. We just happened to be out in the dead of night in Apollo Beach, a residential area, flashing lights — these people brought us on a boat and they were flashing lights at us. And we didn't — you

> know, gee, we didn't know that the boat — I mean, obviously, we thought it was legal, because all the lights were out in the shrimper and they wanted us to see them so they turned all the lights out."

Defendants contend that prosecutorial use of their silence to impeach the exculpatory story offered at trial violated due process rights recognized in *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Defendants cite as additional support three decisions in which this Court interpreted and applied *Doyle* to find reversible error in prosecutorial comment on defendants' silence. *United States v. Meneses-Davila,* 580 F.2d 888 (5th Cir. 1978); *Chapman v. United States,* 547 F.2d 1240 (5th Cir.), *cert. denied,* 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977); *United States v. Luna,* 539 F.2d 417 (5th Cir. 1976).

None of the case support adduced by defendants controls the question before us. In each of those cases, the prosecutor commented on a defendant's failure to exculpate himself after he had been arrested and given *Miranda* warnings. The *Doyle* opinion emphasizes the significance of *Miranda* warnings to the constitutional dimension of improper prosecutorial comment:

> The warnings mandated by that case, . . . require that a person taken into custody be advised immediately that he has the right to remain silent, . . . Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly

> ambiguous because of what the State is required to advise the person arrested.

426 U.S. at 617, 96 S.Ct. at 2244. We are not dealing with ambiguous silence arguably inspired by *Miranda* warnings.

At the time of the boarding and general questioning, defendants were not subjected to coercive or custodial interrogation but only to those restrictions imposed by a routine Customs check. *See United States v. Warren,* 578 F.2d 1058, 1070 (5th Cir. 1978) *(en banc); United States v. Thompson,* 475 F.2d 1359, 1364 (5th Cir. 1973). *See generally* Annot., 31 A.L.R.3d 565, 657-662 (1970).

The explanation for defendants' presence on a boat filled with 50,000 pounds of marijuana was raised for the first time in defendants' closing arguments. In essence, defendants claimed to have boarded the boat at Apollo Beach as hired crew, ignorant of their intended mission. The captain of the vessel, a mysterious figure whose part in these events was never intimated in the course of the trial, went ashore to make arrangements for disposal of the illicit cargo. Meanwhile defendants discovered the marijuana and fled, hijacking the boat with the intention of dumping its cargo in the Gulf of Mexico.

The BONNIE LASS was pursued, the story goes, by several small boats commanded, perhaps, by the enraged captain, defendants suggest. The small boats circled and pulled in front of the BONNIE LASS, trying to intercept her. When the Customs boat arrived on the scene, the smaller boats disappeared. In closing arguments, defendants stressed the maneuvers of these

small boats, repeatedly asking why the Customs officers made no attempt to apprehend them since they carried the real culprits.

Defendants suggested their full cooperation with Customs when boarded, pointing out that no resistance had been offered, defendants had helped by adjusting the brooms and one defendant had even made coffee "for everyone's comfort."

The Government responded to this dramatic characterization of the defendants' predicament in rebuttal closing argument by pointing out its inconsistencies with the manner in which defendants actually received the Customs officers when they boarded. Rather than expressing relief at what would have been their rescue, defendants kept silent and denied having any cargo at all. The Government relates the omitted explanation which should have been given Customs with obvious sarcasm which suggests that the reason the story was not offered was its patent absurdity.

While we find defendants' case authority inapposite, this Court has considered the impeachment use of pre-arrest, pre-*Miranda* silence in *United States v. Henderson,* 565 F.2d 900 (5th Cir. 1978). The Court stated:

> The silence of an accused who has not been given a *Miranda* warning cannot be used against him to impeach his credibility, unless his silence is inconsistent with his innocence and inconsistent with his exculpatory statement given at the trial. Otherwise, it lacks

significant probative value and carries with it an intolerable prejudicial impact.

565 F.2d at 905.

Defendants' failure to explain their dilemma to Customs agents upon boarding and initial questioning is totally inconsistent with their tale of desperate flight and desire to rid themselves of the cargo. The situation is analogous to the scenario depicted in *United States v. Harp*, 536 F.2d 601 (5th Cir. 1976). In *Harp* the Court considered comment on the failure of prisoners apprehended in the middle of an apparent escape attempt to tell the warden the story offered at trial that one prisoner had kidnapped the other nine and forced them into the escape vehicle. The Court found reversible error since *Miranda* warnings had been issued before the failure to explain, but noted that absent *Doyle's* emphasis on *Miranda* warnings, the failure to promptly advise officials of their duress would have been highly probative of the recent fabrication of their exculpatory story.

We conclude that the prosecutor's comments were a permissible response to defendants' closing arguments.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

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Clerk

February 4, 1980

TO ALL PARTIES LISTED BELOW:

NO. 78-5600 —

United States of America

-vs-

Venerando German Serrano, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By /s/ H. E. ADAMS, JR.
Deputy Clerk

cc: Mr. Joseph Ficarrotta
Mr. Anthony F. Gonzalez
Mr. Richard A. Lazzara
Mr. Bennie Lazzara, Jr.
Mr. William R. Tunkey
Mr. Jeffrey S. Weiner
Mr. Gary Betz
Mr. Douglas J. Titus, Jr.